

1-1-2013

Family Law - Expanding Trial Courts' Authority to Create Contracts during the Equitable Division of Property in a Divorce Action - Cesar v. Sundelin, 967 N.E.2D 171 (Mass. App. Ct. 2012)

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Recommended Citation

18 Suffolk J. Trial & App. Advoc. 167 (2013)

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**FAMILY LAW—EXPANDING TRIAL COURTS’
AUTHORITY TO CREATE CONTRACTS DURING
THE EQUITABLE DIVISION OF PROPERTY IN A
DIVORCE ACTION—*CESAR V. SUNDELIN*, 967
N.E.2D 171 (MASS. APP. CT. 2012)**

Massachusetts probate courts are given wide discretion to decide how to divide marital assets in a divorce action.¹ In a divorce action that includes a mutually owned family business in the marital estate, Massachusetts probate courts have the authority to enforce a covenant not-to-compete that was bargained for and agreed to by both parties as part of the “sale” of the family business to one spouse.² In *Cesar v. Sundelin*,³ the Massachusetts Appeals Court addressed whether Massachusetts probate courts have the authority to create a covenant not-to-compete, ordering one spouse not to compete with a jointly owned family business being distributed in a divorce decree.⁴ The court held that Massachusetts probate courts have the authority to create a covenant not-to-compete as part of a divorce decree.⁵

During Marina Cesar (“Cesar”) and Richard Sundelin’s (“Sundelin”) marriage, they opened a feed and grain store on Cape Cod.⁶ Cesar also worked as a veterinarian during their marriage.⁷ Each party

¹ See MASS. GEN. LAWS ch. 208, § 34 (2010) (noting courts can divide both vested and non-vested property regardless of technical title ownership).

² See *Wells v. Wells*, 400 N.E.2d 1317, 1318-20 (Mass. App. Ct. 1980) (holding covenant not-to-compete agreement included in divorce decree enforceable). Mr. and Mrs. Wells agreed in a stipulation that was incorporated in their divorce decree that Mr. Wells would sell his stock in the family business to Mrs. Wells and he would not compete with the business. *Id.* at 1318.

³ 967 N.E.2d 171 (Mass. App. Ct. 2012).

⁴ *Id.* at 171 (stating issue before court).

⁵ *Id.* (announcing court’s holding).

⁶ Brief & Supplemental Appendix Volume I of II for Plaintiff-Appellee at 5, *Cesar v. Sundelin*, 967 N.E.2d 171 (Mass. App. Ct. 2012) (No. 2011-P-0351), 2011 WL 3022093, at *5 [hereinafter Brief for Plaintiff-Appellee] (noting location and timing of store opening); Brief & Record Appendix of Defendant-Appellant Richard R. Sundelin at 4, *Cesar v. Sundelin*, 967 N.E.2d 171 (Mass. App. Ct. 2012) (No. 2011-P-0351), 2011 WL 2548560, at *4 [hereinafter Brief for Defendant-Appellant] (noting timing of store being opened). Cesar and Sundelin were the sole shareholders of the corporation at issue: Cape Feed and Supply, Inc., which is a sub-chapter S corporation. See Brief for Plaintiff-Appellee, *supra*, at *5; see also Brief for Defendant-Appellant, *supra*, at *4.

⁷ Brief for Plaintiff-Appellee, *supra* note 6, at *5; see also *Cesar*, 967 N.E.2d at 172 (noting wife is veterinarian).

indicated early in the divorce proceedings that he or she wanted full control of the feed and grain store.⁸ The probate court awarded sole control of the business to Sundelin after considering the proposed judgment that each party submitted at the end of the trial.⁹

In addition to requesting sole ownership of the business, Sundelin requested an order prohibiting Cesar from competing with the business.¹⁰ Sundelin first mentioned wanting a covenant not-to-compete as part of the division of assets after trial.¹¹ The probate court judge denied Sundelin's request for a non-compete order, reasoning that a non-compete order was beyond the court's authority.¹² Following this order, both parties filed motions to alter and amend the divorce judgment.¹³ The judge amended the judgment but did not readdress the non-compete issue that had previously been decided.¹⁴ On appeal, the Massachusetts Appeals Court held that the probate court should have considered whether a non-compete order is appropriate in this case because imposing a non-compete order is within the probate court's equitable powers.¹⁵

⁸ See *Cesar*, 967 N.E.2d at 171; see also Brief for Plaintiff-Appellee, *supra* note 6, at *2; Brief for Defendant-Appellant, *supra* note 6, at *4. Cesar filed for divorce on February 19, 2009, after Cesar and Sundelin had already been separated for approximately a year. See Brief for Plaintiff-Appellee, *supra* note 6, at *2, *5 (noting date divorce complaint filed and indicating couple separated in November of 2008).

⁹ See Brief for Plaintiff-Appellee, *supra* note 6, at *3 ("In the judgment of divorce, the trial court . . . orders the Wife to 'transfer all of her right, title and interest in the business as well as all shares of stock in the corresponding Massachusetts sub-chapter S corporation to the Husband.'"); see also *Cesar*, 967 N.E.2d at 171-72 (describing procedural history of case); Brief for Defendant-Appellant, *supra* note 6, at *3 (noting judge awarded control of business to Sundelin).

¹⁰ See *Cesar*, 967 N.E.2d at 172 (noting Sundelin attempted to ensure goodwill of business was protected); see also Brief for Plaintiff-Appellee, *supra* note 6, at *3-*4 (noting Sundelin's request for non-competition order was rejected).

¹¹ See Brief for Plaintiff-Appellee, *supra* note 6, at *3-*4 (explaining Sundelin did not mention covenant not-to-compete until after trial). In her brief, Cesar specifically noted that Sundelin did not request a non-compete order in his Answer, Counterclaim, or pre-trial memorandum and that Sundelin did not file a complaint in equity or use any other mechanism prior to trial to make this request. *Id.* at *2-*3,*17 (detailing sequence of events prior to trial).

¹² *Cesar*, 967 N.E.2d at 172 n.3 ("Specifically, the judge stated in his decision, '[C]ertainly the Court has no authority to do that, and hence will not.'"). In addition, the probate court never explicitly made findings concerning the value of the goodwill in Cape Feed and Supply, Inc. See *id.* (noting goodwill could be factored into asset distribution even in absence of specific findings).

¹³ See Brief for Plaintiff-Appellee, *supra* note 6, at *4 ("[H]usband argues, inter alia, that the trial court 'can . . . issue a non-compete clause as one of its equitable remedies.'" (alteration in original)); Brief for Defendant-Appellant, *supra* note 6, at *3 (noting Sundelin's request included reasons why non-compete can be ordered).

¹⁴ See Brief for Defendant-Appellant, *supra* note 6, at *3 (noting Amended Judgment did not include non-compete order or mention request for one); see also *supra* note 12 and accompanying text (explaining non-compete order already rejected because it was beyond court's authority).

¹⁵ See *Cesar*, 967 N.E.2d at 173 (vacating portion of judgment supported by judge's lack of authority to create non-competition order).

The General Laws of Massachusetts provide probate judges with broad discretion to determine how to divide the marital assets in a divorce action and what assets will be included in the marital estate.¹⁶ Probate judges are given the authority to include any of either spouse's individual assets in the marital estate—making it subject to division—regardless of whether it was obtained before or after the parties were married.¹⁷

¹⁶ See MASS. GEN. LAWS ch. 208, § 34 (2010) (providing jurisdiction and authority to distribute any part of each spouse's estate); see also *Adams v. Adams*, 945 N.E.2d 844, 857 (Mass. 2011) (“According to broad discretion to the judge’s division of property pursuant to the § 34 factors ‘is necessary in order that the courts can handle the myriad of different fact situations which surround divorces and arrive at a fair financial settlement in each case.’” (quoting *Rice v. Rice*, 361 N.E.2d 1305, 1307 (Mass. 1977))); Michael J. DeTergo, Note, *The Use of Support Modification to Re-Litigate Equitably Divided Property in Massachusetts: Does Heins v. Ledis Draw the Line?*, 2 SUFFOLK J. TRIAL & APP. ADVOC. 145, 149 (1997) (noting probate court’s discretion “nearly absolute” when determining how marital assets should be divided). However, in exercising this discretion, probate courts must consider certain factors that are defined in the statute. See § 34 (defining certain indicators that court must consider, such as length of marriage); see also *Bowring v. Reid*, 503 N.E.2d 966, 967-68 (Mass. 1987) (explaining abuse of discretion analysis in marital distribution cases considers whether factors have been used). The factors that a judge must consider are:

[T]he length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony, if any, awarded under sections 48 to 55, inclusive.

§ 34. Massachusetts has a low divorce rate compared to other states; however, in 2009 there were still 27,445 divorce cases filed in Massachusetts’ probate courts. See *I Don’t: Divorce Rates by State*, WALL ST. J., Aug. 13, 2010, http://s.wsj.net/public/resources/documents/st_DIVORCE_20100813.html (showing that Massachusetts has divorce rate of two divorces per 1000 people); *Fiscal Year 2011 Statistics*, PROB. & FAM. CT. DEPARTMENT, <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/summarystats2011-1.html> (last updated Nov. 9, 2011, 9:00 AM) (detailing filing rates in Massachusetts probate courts).

¹⁷ See § 34 (specifying past, present, and future assets are within jurisdiction of court). Massachusetts has included in its statutes the common law principle of a “hotchpot” system, which provides that there are no boundaries for assets belonging to one spouse. See Elijah L. Milne, *Recharacterizing Separate Property at Divorce*, 84 U. DET. MERCY L. REV. 307, 312 n.44 (2007) (noting Massachusetts’ use of common law “hotchpot” system). Despite this broad authority, the Supreme Judicial Court has recognized some minimal exceptions—such as assets that are too speculative—when assets cannot be included in the marital estate. See *Adams*, 945 N.E.2d at 858 (holding profit-sharing arrangements can be included in estate because such arrangements not too speculative); *Drapek v. Drapek*, 503 N.E.2d 946, 949-50 (Mass. 1987) (recognizing medical license too speculative to be included in marital estate). Providing such broad discretion has been criticized as creating “uncertainty and unpredictability” in divorce proceedings, which is likely to result in similar facts being treated differently from one case to the next. See Milne, *supra*, at 315 (noting too much discretion can “lead to inconsistent and disparate results”). Milne suggests that unpredictable property division systems discourage settlement, increase the cost of divorce litigation, and favor the spouse that is more willing to take risks. *Id.*

Massachusetts probate courts also have the discretion to award alimony as part of the divorce order.¹⁸ Regardless of the level of discretion a state provides to its probate judges, most states recognize that the goodwill of a commercial company is a marital asset if one spouse owns that company.¹⁹ Goodwill of a company that is being sold outside of divorce proceedings is sometimes protected by negotiating a covenant not-to-compete.²⁰ Some

at 314-15 (“The lack of predictability that broad judicial discretion engenders impedes settlement, promotes protracted, expensive, and often bitter litigation, and also ‘gives those willing to gamble a negotiating advantage over a more risk-averse spouse.’”). By using the hotchpot system, Massachusetts probate courts have more authority over each spouse’s assets than most other state probate courts. See Marsha Garrison, *What’s Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 60 (2011) (noting minority of districts allow judges to include all assets in marital estate); Marshal S. Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, NEV. LAW., May 2011, at 6, 7 (noting minority of jurisdictions use hotchpot system). However, in most states’ judges do have discretion to determine how to divide the property that is within the marital estate. See Garrison, *supra*, at 68-69. Only a few states have limited judicial discretion to determine what portion of the estate each spouse should receive by creating a presumption of equitable distribution. Garrison, *supra*, at 70 (explaining few jurisdictions require or have presumption of equitable distribution).

¹⁸ See MASS. GEN. LAWS ch. 208 § 53 (2012) (requiring probate courts to consider certain factors in determining alimony); CHARLES P. KINDREGAN, JR. & MONROE L. INKER, 2A MASS. PRAC., FAMILY LAW AND PRACTICE § 40:2 (3d ed. 2012) (noting court’s discretion to use alimony, property distribution, or both to address parties’ finances); see also *Adams*, 945 N.E.2d at 857 (explaining probate judge denied wife’s alimony request because equitable distribution would appropriately provide for wife). Unlike property distribution, an alimony award can be modified after the divorce proceeding as circumstances change. See KINDREGAN & INKER, *supra*, at § 40:3 (“[A]limony is subject to modification whereas an order of property division is final and is not modifiable.”); see also MASS. GEN. LAWS ch. 208, § 37 (2010) (providing authority for probate court to modify alimony payments after divorce judgment). Massachusetts courts have recognized that “double dipping” may occur because both alimony and equitable distribution can be awarded, and both require consideration of the same factors. See *Adams*, 945 N.E.2d at 873. As a result, courts suggest that probate courts should make efforts to avoid “double dipping.” See *id.* (“Massachusetts has also looked with disfavor at so-called ‘double-dipping,’ a term used to describe ‘the seeming injustice that occurs when property is awarded to one spouse in an equitable distribution of marital assets and is then also considered as a source of income for purposes of imposing support obligations.’” (quoting *Adlakha v. Adlakha*, 844 N.E.2d 700, 705-06 (Mass. App. Ct. 2006))).

¹⁹ See J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958-2008*, 42 FAM. L.Q. 419, 430 (2008) (noting goodwill considered divisible asset by most states); Carmen Valle Patel, Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554, 561-63 (1983) (explaining when goodwill is generally considered divisible asset); see also Garrison, *supra* note 17, at 60 (noting most jurisdictions only allow probate courts to divide property obtained during marriage). One author suggests that it is critical for a court to include goodwill as one of the marital assets to be divided because it can be a significant asset. See Randall B. Wilhite, *The Effect of Goodwill in Determining the Value of a Business in a Divorce*, 35 FAM. L.Q. 351, 381 (2001) (noting importance of including goodwill in valuation of marital estate).

²⁰ See BLACK’S LAW DICTIONARY 420 (9th ed. 2009) (“Noncompetition covenants are valid to protect business goodwill in the sale of a company.”).

probate courts have recognized a covenant not-to-compete as a distributable asset in a divorce proceeding.²¹

A covenant not-to-compete or a noncompetition agreement generally arises between an employee and employer or is associated with the sale of a business.²² Courts in most states have the authority to assess the reasonableness of a covenant not-to-compete and to find unreasonable covenants to be unenforceable.²³ A Massachusetts court that finds a covenant not-to-compete to be unreasonable has authority to alter or change the covenant to make it reasonable.²⁴ Although reasonableness is

²¹ See *Holland v. Holland*, 35 P.3d 409, 415 (Wyo. 2001) (holding covenant not-to-compete negotiated by divorcing parties is valid and enforceable); see also *Wells v. Wells*, 400 N.E.2d 1317, 1318 (Mass. App. Ct. 1980) (recognizing mutually agreed upon covenant not-to-compete can be incorporated in divorce decree).

²² See BLACK'S LAW DICTIONARY 420 (9th ed. 2009) (noting noncompetition agreements generally arise "in a sale-of-business, partnership, or employment contract"). A covenant not-to-compete is an agreement "not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer." *Id.* This type of agreement was considered an unenforceable restraint on trade under English common law. See Russell Beck, *THE LAW OF RESTRICTIVE COVENANTS: NEGOTIATING, DRAFTING, AND ENFORCING NONCOMPETITION AGREEMENTS AND RELATED RESTRICTIVE COVENANTS*, § 1 (Mass. Continuing Legal Educ., Inc. ed., 4th ed. 2010) (noting ban on covenants not-to-compete continued in English common law until 1621).

²³ See Samuel C. Damren, *The Theory of "Involuntary" Contracts: The Judicial Rewriting of Unreasonable Covenants Not to Compete*, 6 TEX. WESLEYAN L. REV. 71, 72 (1999) (discussing use of reasonableness test in analyzing covenants not-to-compete); see also Beck, *supra* note 22, at § 2 ("Under Massachusetts contract law, noncompetition agreements [and similar restrictive covenants] are enforceable to the extent that they are reasonable and necessary to protect the employer's legitimate interests while not interfering with ordinary competition.") (quoting *IKON Office Solutions, Inc. v. Belanger*, 59 F. Supp. 2d 125, 128 (D. Mass. 1999)). Two courts that have reviewed the enforceability of covenants not-to-compete that were voluntarily agreed upon by divorcing parties during the divorce negotiations have analyzed the reasonableness of the covenants using the criteria generally used for an agreement signed during the sale of a business. See *Wells*, 400 N.E.2d at 1320 (holding covenant enforceable using factors typically used to evaluate covenants agreed upon in business sale); *Holland*, 35 P.3d at 415 ("[D]isposition of property in a marriage dissolution proceeding action is analogous to the sale of a business . . ."). In *Holland*, the court held the covenant was enforceable, reasoning that it was similar to the sale of the business because the husband had "voluntarily agreed to the covenant as part of arm's length negotiations and without coercion from the district court, he received in excess of \$300,000.00 as consideration for his agreement (as well as receiving all of the parties' real property, much of which was income producing) . . ." 35 P.3d at 415.

²⁴ See *Kroeger v. Stop & Shop Cos.*, 432 N.E.2d 566, 571 (Mass. App. Ct. 1982) (approving trial judge's alteration of covenant not-to-compete). Some states have held that a judge has the authority to void specific terms of the agreement, or the agreement in its entirety, if it is found to be unreasonable, but it is beyond judicial discretion to rewrite an unreasonable agreement. See Damren, *supra* note 23, at 72 ("[A] majority of jurisdictions either eliminate ('blue pencil') these terms or void the entire restrictive covenant."). Courts' authority to rewrite previously agreed upon agreements has been criticized as perverting the voluntary nature of the original agreement. See *id.* at 73. One potential concern is that the newly rewritten agreement does not compensate the party who bargained for the unfair term, leaving that party with conditions for which he did

the general standard, courts in Massachusetts conduct a less searching review of a covenant not-to-compete that is included as part of an agreement to sell a business than would be conducted for a similar agreement made in the employer-employee context.²⁵

States are split as to whether it is acceptable for probate courts to impose a covenant not-to-compete as part of the equitable property division in a divorce proceeding.²⁶ Some states reason that courts can impose covenants not-to-compete in a divorce decree because the order is vital to the protection of the goodwill of a business that is being distributed in the action.²⁷ In contrast, states that have found it inappropriate for a probate court to impose a covenant not-to-compete as part of asset distribution are reluctant to grant the courts more authority over a spouse's future earnings and profession.²⁸

In *Cesar v. Sundelin*, the Massachusetts Appeals Court emphasized the broad and flexible statutory authority that probate judges have to divide marital assets to support its finding that probate judges have the authority to order covenants not-to-compete.²⁹ The court further explained that because the authority is flexible, there does not need to be any express

not negotiate. *See id.*

²⁵ *See Beck, supra* note 22, at § 2 (noting different level of review for covenants not-to-compete in employment context); *see also* *Boulanger v. Dunkin' Donuts Inc.*, 815 N.E.2d 572, 577 (Mass. 2004) (“In the context of the sale of a business, courts look ‘less critically’ at covenants not to compete because they do not implicate an individual’s right to employment to the same degree as in the employment context.”).

²⁶ *See* 54A AM. JUR. 2D *Monopolies and Restraints of Trade* § 942 (2012) (explaining only some jurisdictions allow courts to order non-competition in divorce decree). *Compare* *In re Marriage of Fischer*, 834 P.2d 270, 273 (Colo. App. 1992) (allowing creation of covenant), *and Kelly v. Kelly*, 806 N.W.2d 133, 144 (N.D. 2011) (affirming order not to interfere with family business for five years imposed in divorce action), *with Favell v. Favell*, 957 P.2d 556, 559-60 (Okla. Civ. App. 1997) (noting covenant by definition is agreement, not order), *and Ulmer v. Ulmer*, 717 S.W.2d 665, 667-68 (Tex. App. 1986) (noting “individual’s right to practice his profession is not subject to division by the court.”).

²⁷ *See In re Marriage of Fischer*, 834 P.2d at 271-72 (reasoning imposition of covenant not-to-compete appropriate if goodwill included as part of business’s value); *Kelly*, 806 N.W.2d at 144 (noting covenants not-to-compete can be created if tied to court’s authority to protect company’s goodwill). In *In re Marriage of Fischer*, the lower court included goodwill in the value of the business, which was awarded to the wife. *See* 834 P.2d at 272. The lower court concluded, and the Colorado Court of Appeals affirmed, that it had the authority and the responsibility to protect the goodwill of the business with a covenant not-to-compete. *See id.* at 272.

²⁸ *See Favell*, 957 P.2d at 561 (noting spouses’ “future earning capacity . . . is not marital property to be divided”); *Ulmer*, 717 S.W.2d at 667-68 (noting “individual’s right to practice his profession is not subject to division by the court”).

²⁹ *See* 967 N.E.2d 171, 172-73 (noting “equity powers of a probate judge are ‘broad and flexible’” (quoting *In re Moe*, 432 N.E.2d 712, 718 (1982))).

statutory authority to support an equitable action.³⁰ The Massachusetts Appeals Court reasoned that since goodwill is part of the marital estate, it is subject to the broad equitable powers of a probate judge in the equitable distribution of the estate.³¹

After holding that probate judges have the authority to impose a covenant not-to-compete, the Massachusetts Appeals Court declined to comment as to whether the authority could be exercised in this case.³² The Massachusetts Appeals Court reasoned there was no need to reach the questions of covenant reasonableness or whether the husband's insistence on a covenant was timely because the probate judge based his rejection of the covenant on a presumed lack of authority.³³ The Massachusetts Appeals Court held that probate judges have the authority to act equitably, including ordering an involuntary covenant not-to-compete, but left the probate judges to interpret how far that authority extends.³⁴

The extension of the probate court's power to include creating contracts that control one or both spouses' professional future is particularly problematic when considering the expansive power over all assets of divorcing individuals given to Massachusetts probate judges.³⁵ Prior to *Cesar*, Massachusetts probate courts already had the discretion to include both assets that were acquired before marriage and that will vest after marriage in the marital estate for equitable distribution.³⁶ Moreover, by valuing the business goodwill lower if the individual spouse is critical to

³⁰ *Id.*

³¹ *Id.* at 172.

³² *Id.* at 173 ("We stress the limited nature of our ruling. We state no position as to whether the husband is entitled to a noncompete order . . .").

³³ *Cesar*, 967 N.E.2d at 172-73 (vacating only portion of judgment based upon lack of authority).

³⁴ *Id.*

³⁵ *See id.* (holding probate courts have authority to order covenant not-to-compete); *supra* notes 16-17 and accompanying text (noting Massachusetts probate court's broad authority and discretion in divorce action); Milne, *supra* note 17, at 314-15 (explaining too much judicial discretion creates unpredictable divorce proceedings); *see also supra* note 28 and accompanying text (explaining imposition of covenant not-to-compete gives judicial authority over parties' professions). Elijah Milne suggests that the unpredictability of a hotchpot system is disadvantageous to the risk-adverse spouse. *See Milne, supra* note 17, at 314-15. After *Cesar*, the unpredictability will only increase because, in addition to the entirety of both spouses' assets, probate courts can now limit one spouse's ability to practice his or her profession. *See Cesar*, 967 N.E.2d at 173; Milne, *supra* note 17, at 314-15.

³⁶ *See supra* note 17 and accompanying text (noting breadth of court's authority over property); *see also* Garrison, *supra* note 17, at 68-69 (explaining majority of states do not give courts authority over all of both spouses' assets). Massachusetts probate courts also have the authority to impose future support orders between the spouses through alimony orders. *See supra* note 18 and accompanying text (explaining alimony can be used in combination with distribution of assets to settle parties' finances).

the business, the court already has the mechanism to make the agreement fair without imposing a covenant not-to-compete.³⁷ It is unnecessary to also provide the court with a mechanism to force parties into an involuntary contract that limits their professional futures.³⁸

Furthermore, in making its decision, the Massachusetts Appeals Court failed to consider several questions: first, how creating a covenant would affect the factors already considered to determine alimony and the appropriate property distribution; and second, how this authority fits within the current Massachusetts jurisprudence concerning covenants not-to-compete.³⁹ Currently, a probate court is required to consider the “occupation, amount and sources of income, vocational skills, . . . [and] employability” when determining how to distribute items in the marital estate and whether to award alimony.⁴⁰ As a result of this court’s failure to

³⁷ See *supra* note 19 and accompanying text (noting goodwill is divisible asset in divorce proceeding). Furthermore, a court can impose a more flexible agreement that would allow the order to be re-evaluated on motion of either party by using alimony. See *supra* note 18 and accompanying text (noting alimony can be used but also is subject to modification). Prior to this decision, the Supreme Judicial Court recognized that Massachusetts General Laws chapter 208, section thirty-four provides discretion to the court to handle a variety of factual situations. See *Adams v. Adams*, 945 N.E.2d 844, 857 (Mass. 2011) (explaining factors enumerated in statute provided appropriate amount of flexibility). Despite that vote of confidence, the discretion already provided creates a potential problem of double-dipping—forcing one spouse to pay twice via property division and alimony—which creates uncertainty in how the end result of a divorce proceedings would compare with the result of a similar factual situation. See *Milne*, *supra* note 17, at 315 (explaining discretion leads to different results for similar factual situations); see also *supra* note 18 and accompanying text (explaining how use of same factors for alimony and equitable distribution could result in double-dipping).

³⁸ See *supra* note 37 and accompanying text (explaining various mechanisms already available to judges to appropriately divide assets); *supra* note 28 and accompanying text (explaining other courts have recognized flaw in giving probate court authority over an individual’s profession). It has been recognized as contrary to public policy to involuntarily impose limitations on an individual’s ability to work. See *Boulanger v. Dunkin’ Donuts Inc.*, 815 N.E.2d 572, 578 (Mass. 2004) (expressing greater concern about employment covenants because greater effect on “an individual’s right to employment”); *Favell v. Favell*, 957 P.2d 556, 561 (Okla. Civ. App. 1997) (noting strong public policy and legislative limitations on parties’ ability to voluntarily agree to restraints); *Beck*, *supra* note 22, at § 2 (explaining court particularly concerned about involuntary agreements that limit ability to work); see also *Beck*, *supra* note 22, at § 1 (noting covenants not-to-compete traditionally not allowed).

³⁹ See *infra* notes 40-41 and accompanying text (noting factors for determining alimony and equitable distribution and risks already present); see *infra* notes 43-44 and accompanying text (explaining potential for agreements to be unreviewable or to only receive cursory review). See generally *Cesar*, 967 N.E.2d at 171-73 (neglecting to mention how decision affects alimony and asset distribution or covenant review procedure).

⁴⁰ See MASS. GEN. LAWS ch. 208, § 34 (2010) (noting factors judge must consider prior to awarding alimony or dividing marital assets); see also *Adams*, 945 N.E.2d at 873 (noting alimony awards should be determined using same factors as are used to distribute property); *Bowring v. Reid*, 503 N.E.2d 966, 968 (Mass. 1987) (explaining abuse of discretion analysis starts with determining if factors were used).

provide guidelines for the implementation of a court ordered covenant, or to discuss how a lower court's action in limiting one spouse's ability to be employed or produce income affects these considerations, it will be even more complicated for probate courts to avoid inappropriately valuing and distributing assets that are uncertain while adjusting for new limits on a spouse's profession.⁴¹ Furthermore, given the inability to modify property distributions, the court should have explained when or if these involuntary contracts could be modified.⁴² Involuntary covenants not-to-compete imposed by a court should be reviewable with a more searching review—as is done with employment covenants not-to-compete—because it is as coercive as an employment contract and affects future employment of a spouse.⁴³ The Massachusetts Appeals Court's failure to address this issue makes it likely that even if the covenants are seen to be reviewable, the court ordered agreements will be inappropriately analyzed in the less searching model provided for agreements not-to-compete made as part of the sale of the business.⁴⁴

Finally, the court did not have to reach the question of whether a probate court can impose a covenant.⁴⁵ Imposing a covenant not-to-compete is contrary to contract theories because it is not based on a mutual agreement.⁴⁶ However, here the covenant-not-compete was not raised by Sundelin until after Cesar had submitted her proposed judgment.⁴⁷ The

⁴¹ See *supra* note 40 and accompanying text (noting factors currently considered); see also *supra* note 18 (explaining how current system creates potential for “double-dipping”); DelTergo, *supra* note 16, at 159 (noting use of alimony and equitable distribution fails to provide any finality for parties).

⁴² See *KINDREGAN & INKER*, *supra* note 18, at § 38:2 (explaining property division final but alimony orders can be modified).

⁴³ See *supra* note 25 and accompanying text (noting less stringent review used for covenants related to sale of business); see also *Holland v. Holland*, 35 P.3d 409, 415 (Wyo. 2001) (explaining covenant was reasonable partially because husband “voluntarily agreed . . . without coercion from the district court”).

⁴⁴ See *Wells v. Wells*, 400 N.E.2d 1317, 1318-20 (Mass. App. Ct. 1980) (using sale of business reasonableness criteria to evaluate covenant entered into during divorce); see also *supra* note 22 and accompanying text (noting covenants not-to-compete generally mutually entered into either during sale of business or employment).

⁴⁵ See Brief for Plaintiff-Appellee, *supra* note 6, at *3-*4 (explaining Sundelin did not mention covenant not-to-compete until after trial); Damren, *supra* note 23, at 78 (discussing criticism of court's authority to strike covenant terms grounded in changed original agreement).

⁴⁶ See *supra* note 22 and accompanying text (stating covenant not-to-compete created through mutual agreement); see also *Favell v. Favell*, 957 P.2d 556, 559-60 (Okla. Civ. App. 1997) (explaining that covenant needs to be based on agreement); Damren, *supra* note 23, at 73-76 (noting criticism of authority to rewrite contracts because changes mutually agreed upon terms).

⁴⁷ See *supra* note 11 and accompanying text (noting Sundelin did not raise wanting covenant-not-to-compete prior to trial); see also Damren, *supra* note 23, at 78 (explaining criticism of

timing of Sundelin's request did not give Cesar an adequate opportunity to strategically position herself to argue for an equitable division of marital assets—a situation akin to a court rewriting terms of a contract to remove items that one party had negotiated.⁴⁸ The court could have simply dismissed Sundelin's appeal without declaring that probate courts have the power to create covenants.⁴⁹

In *Cesar v. Sundelin*, the Massachusetts Appeals Court decided that probate courts have the authority to impose a covenant-not-to compete on a spouse in a divorce action. This is an unwarranted expansion of the already sweeping power of the probate court, as it allows the probate court to affect the spouse's ability to work in addition to deciding what happens with his or her property. Further, the Court did not have to decide this issue because the covenant was clearly inappropriate for the facts at bar. Nevertheless, after deciding to expand the power, the court should have provided careful guidance to limit the impact of this decision as opposed to leaving it open for dispute. Divorcing couples engaged in a mutual business venture can anticipate even more uncertainty in their financial futures—including for some spouses, his or her future earning opportunities—because the court failed to take those steps.

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court's authority to strike terms in covenants grounded in changing original agreement). A major issue with allowing a court to strike terms of an agreement is the lack of compensation for a party who loses a bargained for term. See Damren, *supra* note 23, at 72 (noting court's change to voluntary agreements takes away bargained-for terms without compensation). Here, Cesar presented evidence relevant to other issues at trial but did not present a defense concerning the effect of a non-competition agreement. See Brief for Plaintiff-Appellee, *supra* note 6, at *3 (explaining lack of notice of covenant-not-to compete).

⁴⁸ See Brief for Plaintiff-Appellee, *supra* note 6, at *3-*4 (stating timing of request); Damren, *supra* note 23, at 72, 78 (noting criticism of court rewriting agreements).

⁴⁹ *C.f.* *Cesar v. Sundelin*, 967 N.E.2d 171, 173 (Mass. App. Ct. 2012) (explaining court specifically did not address Cesar's arguments of issue being waived).